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Supreme Court, U.S.
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No. 98-314

In The

Supreme Court of the United States

October Term, 1997

JIM MATTSON,

Petitioner,

vs.

THOMAS O. SCHULTZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARK S. NELSON
Counsel of Record
NELSON, DRIES & ZIMMERMAN, S.C.
Attorneys for Respondent
150 North Sunnyslope Road
Suite 305
P.O. Box 1390
Brookfield, WI 53008-1390
(414) 789-5880

148658

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Is a trial court required in all age discrimination cases to instruct the jury on the *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) elements of a *prima facie* case?

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REASONS FOR DENYING THE WRIT

I.

COURTS ARE NOT REQUIRED TO INSTRUCT JURIES ON THE *McDONNELL DOUGLAS* ELEMENTS OF A *PRIMA FACIE* CASE.

This Court has set forth a model for analyzing claims of discrimination for cases where there is no direct evidence of discriminatory intent. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). The first step in the model requires a plaintiff to carry the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. Thereafter, the model employs a burden-shifting methodology as between the plaintiff and the defendant, but the defendant's burden is limited to producing evidence that the adverse employment actions were taken for a legitimate nondiscriminatory reason. *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. The *McDonnell Douglas-Burdine-Hicks* methodology does not relieve the plaintiff of the burden to prove intentional discrimination:

> It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

St. Mary's Honor Center v. Hicks, 509 U.S. at 507, 113 S. Ct. at 2747, quoting *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093.

In *Burdine*, this Court stated as follows:

> The allocation of the burdens and the creation of a presumption by the establishment of a *prima facie* case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Burdine, 450 U.S. 255, n.8, 101 S. Ct. at 1094, n.8.

Thus, the *prima facie* presumption is a *procedural* device, designed only to establish an order of proof and production. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 521, 113 S. Ct. at 2755.

On this Petition, the plaintiff-petitioner seeks a rule requiring trial courts to give jury instructions which detail the *prima facie* case elements of the *McDonnell Douglas-Burdine-Hicks* model. Such a rule has already been rejected by this Court, as well as by many of the circuit courts of appeals. The plaintiff-petitioner has cited no jurisdiction where such a rule has been adopted. The petitioner has similarly not established that there is any conflict within the circuits.[1]

Application of the burden-shifting rules of *McDonnell Douglas* generally presents a question of law for the court. B. Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW, p. 38, BNA (3d ed. 1996). This Court has stressed that the elements that make up a *prima facie* case are for the judge, not the jury, *Achor v. Riverside Golf Club*, 117 F.3d 339, 341 (7th

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1. While arguing for the absolute rule that would in all cases require a *McDonnell Douglas* jury instruction, the petitioner makes no effort to analyze the jury instructions that were actually given in this case. The petitioner has made no effort to explain how he was prejudiced by the instructions that were given.

Cir. 1997) (citations omitted) and the burden-shifting model does not apply to the jury's evaluation of the evidence at trial. *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S. Ct. 2612 (1995) citing *Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481 (1983) and *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. It is the judge, not the jury who determines whether the plaintiff has carried the burden on the *prima facie* case, and whether the defendant has produced an age neutral explanation. *Gehring*, 43 F.3d at 343. Once the judge has made this decision, it is unnecessary to have the jury go back through these same steps. *See Achor*, 117 F.3d at 341. The First Circuit Court of Appeals has concluded that the *McDonnell Douglas* framework should be monitored by the judge, not the jury:

> *McDonnell Douglas* is to a large extent an analytical framework enunciated *post hoc*, in light of a given set of facts, to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case. In light of this and the fact that the defendants' burden is one of production rather than of persuasion, only the factual determinations necessary to the underlying rationale of *McDonnell Douglas* need be made by the jury — the burden-shifting can and should be monitored by the judge.

Loeb v. Textran, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

Further, once the judge makes this decision, the *prima facie* presumption "drops from the case," *Burdine*, 450 U.S. at 255 (n.10), 101 S. Ct. at 1095 (n.10); "drops out of the picture," *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749; is "no longer relevant" and should not be "resurrected." *Id.* 509 U.S. at 510-511, 113 S. Ct. at 2748-49. *See also Aikens*, 460 U.S. at 714-715, 103 S. Ct. at 1481.

In this case, the *prima facie* presumption had its intended effect by forcing the employer to come forth with its response. *See Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094-1095. Accordingly, any presumption created by the *prima facie* case simply dropped out of the picture and was not to be considered by the jury. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749. The jury then proceeded to the ultimate question of whether the plaintiff proved intentional discrimination. The jury determined that there was no discrimination, and this decision should not be upset.

II.

A RULE REQUIRING JURY INSTRUCTIONS TO SET FORTH IN DETAIL THE *McDONNELL DOUGLAS PRIMA FACIE* ELEMENTS MAY ONLY SERVE TO CONFUSE AND MISLEAD JURIES.

When fashioning jury instructions, a court should attempt to simplify the law so that a jury can focus on the ultimate issue of discrimination. Plaintiff-petitioner's rule that would require a detailed, cumbersome explanation of the *prima facie* elements and the burden-shifting methodology may be confusing to juries and may actually mislead them. The Tenth Circuit Court of Appeals has stated that a jury is not well-suited to understand the shifting burdens of *McDonnell Douglas*:

> While it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes, *McDonnell Douglas* guidelines play differently to a jury than they do in a bench trial. The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury.

> The district courts, therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges.

Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306, 1308 (10th Cir. 1990).

The Second Circuit has criticized lawyers who continue to request the *McDonnell Douglas* framework jury instruction:

> Though we have previously pointed out that the jury trial context creates problems that do not arise in bench trials [citation omitted] lawyers are still prone to include in requested jury charges language that was written by appellate courts in the context of bench trials — language that is at best irrelevant, and at worst misleading to a jury.

Cabrera v. Jakabovitz, 24 F.3d 372, 380, *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994).

This court has recognized that triers of fact are faced with "sensitive" and "difficult" questions in discrimination cases. *Aikens*, 460 U.S. at 716, 103 S. Ct. at 1482. Therefore, the inquiry should not be made "even more difficult by applying legal rules which were devised to govern 'the basic allocation' of burdens and orders of presentation of proof." *Id.* citing *Burdine*, 450 U.S. at 252, 101 S. Ct. at 1093.

III.

THERE IS NO CONFLICT WITHIN THE COURT OF APPEALS REGARDING THE QUESTION PRESENTED.

In an effort to support a reason for review, petitioner advances a perceived "conflict" between the Seventh and Eighth Circuits. No such conflict exists. The expansive rule that juries must always be instructed on the *McDonnell Douglas prima facie* elements and presumptions, as advanced on this petition by petitioner, is not supported by Eighth Circuit cases. Just because a court may have given such an instruction does not mean that the instructions would always be appropriate, as petitioner suggests. Petitioner's reliance upon just a select few Eighth Circuit cases does not take into account the Eighth Circuit's recognition and well-established rule that a jury need *not* be advised of the burdens of proof as set forth in *McDonnell Douglas*. The Eighth Circuit has stated as follows:

> Williams then argues that Instructions 16 and 20 on the section 1981 race discrimination claim were erroneous because they did not properly advise the jury of the burdens of proof as set out in *McDonnell Douglas*. . . .
>
> The Supreme Court has stressed that the *McDonnell Douglas* stages of proof method was "never intended to be rigid, mechanized, or ritualistic," *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1482 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978)). Likewise, we have held that the *McDonnell Douglas* "ritual is not well suited as a detailed instruction to the jury" and adds little understanding to deciding the ultimate

> question of discrimination. *Grebin v. Sioux Falls Indep. Sch. Dist.*, 779 F.2d 18, 20 (8th Cir. 1985). *See also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016-17 (1st Cir. 1979). We pointed out in *Grebin* that the *McDonnell Douglas* analysis was articulated in a court-tried case, and observed that it is far more applicable to a bench trial than to deliberations of a jury. Once a full record has been developed, as it was in this case, the factfinder should proceed to the specific question of whether the action of the employer was discriminatory. *See Aikens*, 460 U.S. at 715, 103 S.Ct. at 1481.

Williams v. Valentec Kisco, Inc., 964 F.2d 723, 731 (8th Cir. 1992).

More recently, in *Lang v. Star Herald*, 107 F.3d 1308 (8th Cir. 1997), a pregnancy discrimination case, the Eighth Circuit stated as follows:

> Eighth Circuit Model Civil Jury Instruction § 5.91, on which Lang relies, is fully consistent with the requirement that Lang initially establish her prima facie case. True, as Lang points out, the instruction does not explain the *McDonnell Douglas* framework, including the prima facie elements. *See* Manual of the Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 5.91 (1995). *Reference to this complex analysis is not necessary, however, or even recommended. Grebin v. Sioux Falls Indep. Sch. Dist.* No. 49-5, 779 F.2d 18, 20 (8th Cir. 1985); *see also Ryther*, at 844-45 (seven active judges of the en banc court joining Part IIA of Judge Loken's separate opinion, which said district courts are not "constrained to instruct how

> discrimination can be proved" and which rejected *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1105 (8th Cir. 1996), which had stated that "the district courts in this circuit are constrained to instruct juries on the elements of the prima facie case.") *The burden-shifting analysis is simply a procedural framework that progressively focuses the inquiry on the question of whether a material issue of discrimination in fact exists. See Hicks*, 509 U.S. at 506-10, 113 S.Ct. at 2746-49. Model instruction § 5.91 properly focuses on the single ultimate factual issue for the jury — whether the plaintiff is a victim of intentional discrimination — and does not conflict with the requirement that Lang must initially establish a prima facie case to avoid summary judgment or judgment as a matter of law when the case is tried.

Lang v. Star Herald, 107 F.3d at 1312 (emphasis added).

The Eighth Circuit is not alone in its conclusion that it is not necessary, or even recommended, that courts instruct juries on the *McDonnell Douglas prima facie* elements. *See e.g., Cabrera v. Jakabovitz*, 24 F.3d 372 (2nd Cir.), *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994); *Seman v. Copley Cement Co.*, 26 F.3d 428 (3rd Cir.); *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 206 (4th Cir. 1986) ("it is not the purpose of [jury] instructions to immerse the jury in the *McDonnell Douglas* scheme of proof with all its shifting burdens and its subtle variations"); *Woodhouse v. Magnolia Hospital*, 92 F.3d 248, 257 (5th Cir. 1996) ("it is improper to instruct a jury on the elements of the prima facie case"); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992), *cert. denied*, 507 U.S. 909, 113 S. Ct. 1253 (1993) ("[i]nstructing the jury on the elements of a prima facie case, presumptions, and the shifting

burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age"); *Merkel v. Scovill, Inc.*, 787 F.2d 174, 177 (6th Cir. 1986) ("we rejected long ago attempts to mechanically apply to ADEA proceedings the evidentiary standards enumerated in *McDonnell Douglas*"); *Gehring v. Case Corp.*, 43 F.3d at 343 ("the *only* question the jury need answer — is whether the plaintiff is a victim of intentional discrimination"); *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("the presumptions and burdens inherent in the McDonnell Douglas formulation drop out of consideration when the case is submitted to the jury on the merits").

Finally, the petitioner advances the rule that juries in all age discriminations should receive the "standard" jury instruction contained in § 106.03 of C. Devitt *et al.*, FEDERAL JURY PRACTICE AND INSTRUCTION-CIVIL, West Publishing Co. (4th ed. 1987). According to its authors, however, this very instruction should be given with caution:

> Caution is urged when submitting the type of instruction contained in the text.

Id. (Supp. 1997), p. 236. The Second Circuit questioned the use of such "standard" jury instructions:

> 5. Some jury instruction manuals, however, either omit the burden-shifting language of *McDonnell Douglas* and *Burdine*, *see, e.g.*, 3 Edward J. Devitt et al., Federal Jury Practice and Instructions: Civil § 104.04, notes (Supp. 1993), or specifically recommend against its inclusion, *see, e.g.*, Manual of Modern Civil Jury Instructions for the District Courts of the Eighth Circuit 74 (West 1993) ("It is

> unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas*.")

Cabrera v. Jakabovitz, 24 F.3d 372, 381, n.5 (2nd Cir.), *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994).

Simply put, there is no support in the law for the rule advanced by the petitioner.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

MARK S. NELSON
Counsel of Record
NELSON, DRIES & ZIMMERMAN, S.C.
Attorneys for Respondent
150 North Sunnyslope Road
Suite 305
P.O. Box 1390
Brookfield, WI 53008-1390
(414) 789-5880